No. 10,540

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

[illegible] ROOSEVELT and ANN ROOSEVELT,

Appellants

vs.

UNITED STATES OF AMERICA,

Appellee

APPELLANTS' SUPPLEMENTAL BRIEF

Containing Emergency Price Control Act of 1942

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No. 10,540

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ARON ROSENSWEIG and ABE ROSENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' SUPPLEMENTAL BRIEF.

Statement.

The Information filed against defendants (appellants) in the District Court contained six counts. Four of these counts, *i. e.,* Counts II, IV, V and VI, were dismissed by the Government before the trial and are, therefore, not before this Court.

Nor is Count III of the Information before this Court for reasons immediately following. The trial court found defendants guilty on Count III, but the judgment of the Court provided, as to each defendant, that

> "* * * the imposition of sentence on Count Three is suspended for the period of two (2) years and defendant is placed on probation for said period of two years * * *."

Since imposition of sentence on Count III was suspended by the trial court and defendants were placed on probation as to said count for two years, there was no final judgment on Count III and hence the appeal herein does not bring that count before this Court. See *United States v. Albers,* 2 Cir., 115 F. (2d) 833, where the rule applicable here was stated, at page 834, as follows:

> "The appeals of the five appellants placed on probation with imposition of sentence suspended must be dismissed. There is a distinction between suspending execution of sentence and suspending imposition of sentence. If sentence is imposed but execution thereof suspended, there is a final judgment from which an appeal will lie. *Berman v. United States,* 302 U. S. 211, 58 S. Ct. 164, 82 L. Ed. 204. But if imposition of sentence is suspended, no final judgment is entered; hence no appeal is possible. *Birnbaum v. United States,* 4 Cir., 107 F. 2d 885, 126 A. L. R. 1207; *United States v. Lecato,* 2 Cir., 29 F. 2d 694."

See, also, *United States v. Domroe,* 2 Cir., 129 F. (2d) 675, 677-678, to the same effect.

Only Count I of the Information is before this Court. Count I of the Information charges that appellants

> "* * * did knowingly, wilfully and unlawfully offer for sale, sell and deliver to E. E. Surhart at 501 Daisy Avenue, Long Beach, California, one side of U. S. Grade A beef weighing 296 pounds for the sum of $88.91, which said side of U. S. Grade A beef

weighing 296 pounds had a maximum price of $68.18 under the provisions of Revised Maximum Price Regulations 169 (7 Fed. Reg. 10381) as amended, issued by Leon Henderson as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942; contrary to the form and effect of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942)." [R. 4.]

Pending trial of the case below and pursuant to an understanding and agreement with Government Counsel and the Probation Officer of the District Court, appellants withdrew their pleas of not guilty and entered pleas of guilty to Counts I and III of the Information. But the trial court disregarded said understanding and agreement, and rendered the judgments which have been appealed to this Court.

Jurisdiction.

The judgments of the District Court were entered on August 30, 1943. Thereafter, on August 31, 1943, appellants filed their motions

> "* * * for an order vacating judgments, setting aside sentences, granting defendants the right to withdraw their pleas of guilty and to re-enter their pleas of not guilty, and for a new trial." [R. 64.]

This motion was heard and denied by the trial court on September 2, 1943. [R. 80-106.] Thereafter, on Septem-

ber 3, 1943, appellants filed their respective notices of appeal to this Court. [R. 22-31.]

The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended (Section 225(a) of Title 28, U. S. C. A.), and under Rule III, Rules of Practice and Procedure in Criminal Cases (18 U. S. C. A. following Section 688), 292 U. S. 661, 78 L. Ed. 1512, 1513, 54 S. Ct. XXXVII.

Statutes and Regulations Involved.

The case involves the Emergency Price Control Act of 1942 (Act of January 20, 1942, 56 Stat. 23, 50 U. S. C. A., Appendix Supp. II, Sec. 901 *et seq.*), as amended by the Act of October 2, 1942 (56 Stat. 765, 50 U. S. C. A., Appendix Supp. II, Sec. 961 *et seq.*), and Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), purporting to be issued thereunder on December 10, 1942.

Copies of the Emergency Price Control Act and the Act of October 2, 1942, and copy of Revised Maximum Price Regulation No. 169, or pertinent excerpts therefrom, are set forth in the Appendix hereto, or furnished separately to this Court, as requested at the hearing.

Specification of Errors.

The errors assigned [R. 115-119] are summarized in Appellants' Opening Brief, pages 2, 3, to which reference is made.

ARGUMENT.

I.

Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), if Otherwise Valid and Effective, Does Not Cover and Is Without Application to the Offense Charged in Count I of the Information.

The offense charged in Count I of the Information is the alleged unlawful sale and delivery by appellants of a side of beef to one E. E. Surhart at a price in excess of the price fixed by Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381). If said Regulation is otherwise valid and effective (which is denied), appellants assert it does not cover and is not applicable to the sale of a side of beef.

A.

A side of beef is a "beef carcass" and a "beef carcass" is an agricultural commodity; and Revised Maximum Price Regulation No. 169 is not applicable to an agricultural commodity, since said Regulation was not approved by the Secretary of Agriculture, or by the War Food Administrator.

"Beef carcass" is defined in Section 1364.455(a) (8) of Revised Maximum Price Regulation No. 169 as follows:

> " 'Beef carcass' means and is limited to the dressed carcass, side, or sides of beef, which shall be dressed with the 1st and 2nd tail (caudal) vertebrae, kidney knob or knobs and hanging tender left on. The beef carcass shall not be broken in any other manner than provided in paragraph (a) (9) of this sec. 1364.455."

Paragraph (a) (9), referred to in Section 1364.455(a) (8), defines "Beef wholesale cut" as follows:

> "'Beef wholesale cut' means and is limited to any of the following cuts meeting the following minimum specifications, derived from the beef carcass, but excluding the offal and any item not included herein. (All measurements prescribed herein shall be made with a rigid straight ruler. All cuts shall be made according to the definite guides and measurements specified. Ribs are designated as 1st to 13th, inclusive, counting as the 1st rib that one which is nearest the neck end of the side.)"

These definitions show clearly enough that a side of beef is not a "processed product" as argued by the Government. But, the definition of "Processed products" in Section 1364.477(3) of Revised Maximum Price Regulation No. 169 is conclusive. It is there defined as follows:

> "Sec. 1364.477. *Definitions applicable to processed products.* (a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to processed products the term: * * *
>
> "(3) 'Processed Products' means ground, cured, pickled, spiced, smoked, dried or otherwise processed beef and/or veal, including ground hamburger and sausage containing any proportion of beef or veal: *Provided,* That any beef carcass, or cut thereof, including any beef wholesale cut which has been boned as permitted in subpart B of this Revised Regulation or otherwise, or any veal carcass, or cut thereof, including any veal wholesale cut which has been boned as permitted in subpart C of this Revised Regulation or otherwise shall not be deemed a processed product. Products of each grade and brand, and in each stage of processing, shall be considered separate processed

products. Each type of canned and packaged meat, made entirely from beef and/or veal shall be considered a separate processed product. Kosher processed products shall for the purposes of Sec. 1364.476 be regarded as separate processed products."

Under the foregoing definitions it is manifest that a side of beef is not a "processed product" as claimed by the Government in its brief (pp. 16, 17). Moreover, these definitions find ample support in Court decisions.

See

Commonwealth v. Clark, 344 Pa. 155, 25 Atl. (2d) 143;

Florida Packing & Ice Co. v. Carney, 51 Fla. 190, 41 So. 190, 192;

Kennedy v. State Board, 224 Iowa 405, 276 N. W. 205, 206. (App. Rep. Br. pp. 24-27.)

The Government's argument rests upon the theory that a side of beef is a processed product from an agricultural commodity, and that therefore it is covered by Revised Maximum Price Regulation No. 169. If this theory is incorrect—if, as is apparent from the foregoing definitions, a side of beef is not a processed product but is an unprocessed carcass of livestock—then said Regulation No. 169 is not and cannot be applicable to the offense charged in Count I of the Information. This is virtually conceded in the Goverment's brief. It is there said at page 17:

"* * * the two regulations here involved (Nos. 169 and 148) do not cover 'agricultural commodities,' they only embrace *processed* meats." (Italics the Government's.)

And the Government then argues

> "Since the regulation covers commodities processed from agricultural commodities rather than the agricultural commodities themselves, and since Sec. 3 of the Act treats agricultural commodities and commodities processed from agricultural commodities separately (see particularly Sec. 3(c)), it is clear that the Act did not require approval by the Secretary of Agriculture." (*Id.* p. 17.)

But the Government's premise upon which its conclusion rests is unsound under the definitions of Maximum Price Regulation No. 169, *supra,* and therefore its conclusion is equally unsound.

Moreover, the Government concedes that Section 3(e) of the Emergency Price Control Act requires the approval of the Secretary of Agriculture before the Price Administrator can take any action with respect to the regulation of prices of agricultural commodities. (See App. Br. p. 17.) This is also conceded in the opinion of the District Court in *United States v. Charney,* 50 Fed. Supp. 581, cited in the Government's brief (p. 17) where it is said:

> "Sec. 3(e) of the Act requires the approval of the Secretary of Agriculture before any action is taken with respect to any 'agricultural commodities.'"

Section 3(e) of the Emergency Price Control Act of 1942, as amended (Title 50, U. S. C. A. App., Section 903(e)), referred to, provides:

> "Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be

necessary under Section 202 and Section 205(a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture."

The exceptions arising out of Sections 202 and 205(a) and (b), mentioned *supra,* have no bearing upon and are not pertinent to the matters under discussion.

Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) shows on its face that it was not approved by the Secretary of Agriculture, or by the War Food Administrator. Therefore, under the provisions of the Act, and especially under the provisions of Section 3(e) thereof (50 U. S. C. A. App. Section 903(e)) and the definitions prescribed by Section 1364.455(a) (8) and (9) and by Section 1364.477(a) (3) of Revised Maximum Price Regulation No. 169, *supra,* the Act and Regulation did not cover and were not applicable to the sale of a side of beef which is an agricultural commodity. The sale mentioned and described in Count I of the Information did not violate any of the effective provisions of the Act or Regulation and therefore was not an offense against the laws of the United States.

B.

Section 204(d) of the Act does not preclude appellants from raising the question that Revised Maximum Price Regulation No. 169 does not cover and is without application to the offense charged in Count I of the Information.

In their Opening Brief (pp. 6-8) appellants asserted that Revised Maximum Price Regulations Nos. 169 and 148 never became effective because the same were not approved by the Secretary of Agriculture. The point is

further discussed and elaborated in Appellants' Reply Brief (pp. 24-27). That Regulation No. 169 never became effective with respect to an agricultural commodity, such as the side of beef mentioned in Count I of the Information, has been fully established. Nor is it necessary in this connection to question generally the validity of said Regulation No. 169. It is sufficient to point out the fact that, because the Regulation was not approved by the Secretary of Agriculture, it did not become effective as to agricultural commodities. Otherwise expressed, as to that purpose the Regulation simply did not come into existence. It is analogous to a bill introduced in Congress, which is passed or approved by the House but never approved by the Senate. The bill does not become law under such circumstances.

The Government's argument (its Brief pp. 9-17) that Section 204(d) precludes consideration of the question whether Regulation No. 169 is valid cannot apply to consideration of the effectiveness of the Regulation because it never came into existence as to agricultural commodities.

Nor does the recent decision of the Supreme Court of the United States (March 27, 1944) in Cases Nos. 374 and 375—*Yakus v. United States* and *Rottenberg v. United States* (12 United States Law Week, p. 4262 *et seq.*)—affect the question here under discussion.

In the *Yakus* and *Rottenberg Cases* the majority of the Supreme Court held (1) that the Emergency Price Control Act does not invalidly delegate legislative power to the Price Administrator; (2) that Section 204(d) of the

Act is intended to preclude consideration by the District Court of the *validity* of a price regulation as a defense to a criminal prosecution for violation of the Act; and (3) that the procedure provided in the Act for administrative and judicial review of Regulations is exclusive and sufficient to meet the demands of due process. Significantly, in this connection the Supreme Court said (12 United States Law Week, p. 4268):

> "We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face."

Thus that question is left open for future decision by the Court.

Whether or not Regulation No. 169 is unconstitutional and void on its face is not now an issue in this case. The issue here is, whether the Regulation became effective as to agricultural commodities. If it did not become effective as to such commodities, then the offense charged in Count I of the Information is not a violation of the Act or the Regulation and appellants have committed no crime against the laws of the United States.

That Revised Maximum Price Regulation No. 169 never became effective as to agricultural commodities cannot be doubted and, moreover, is admitted in Appellee's Brief (pp. 16-17). It is respectfully submitted that no crime was charged in Count I of the Information, and therefore the judgments based thereon should be reversed.

II.

The Trial Court Abused Its Discretion in Refusing to Vacate Judgments and Sentences and Permit Defendants to Withdraw Pleas of Guilty and Reenter Pleas of Not Guilty, and in Refusing a New Trial.

The record shows that appellants would not have withdrawn their pleas of not guilty to all counts of the Information and would not have entered pleas of guilty to Counts I and III thereof, but for the understanding and agreement reached with Counsel for the Government and the Probation Officer of the District Court. [R. 61-62.] The record also shows that appellants were sentenced for crimes not charged against them in the Information and to which they did not plead guilty. These facts were brought to the attention of the trial court at the hearing of appellants' motion to vacate judgments and sentences and permit defendants to withdraw pleas of guilty and reenter pleas of not guilty, and for a new trial. Under these facts it was an abuse of discretion for the trial court to deny appellants' motion.

A.

Appellants are entitled to raise this question on appeal. The order denying motion to vacate judgments and sentences and for a new trial is final and appealable, and has been appealed from. This Court has jurisdiction to hear this appeal. (See Sec. 128 of the Judicial Code (28 U. S. C. A., Sec. 225(a).) See, also, Rule III, Rules of Practice and Procedure in Criminal Cases (18 U. S. C. A. following Sec. 688), 292 U. S. 661, 78 L. Ed. 1512 *et seq.*, 54 S. Ct. XXXVII.)

Rule II(4) of Rules of Practice and Procedure in Criminal Cases (28 U. S. C. A. following Sec. 723a) does

not preclude this Court from reviewing the abuse of discretion committed by the trial court in denying appellants' motion to vacate judgments and sentences and grant a new trial, under the facts shown by the record.

Camarota v. United States (3d Cir.), 2 F. (2d) 650;

Moody v. Riechow, 38 Wash. 303, 80 Pac. 461, 462;

United States v. Fox (3d Cir.), 130 F. (2d) 50;

Kercheval v. United States, 274 U. S. 220, 71 L. Ed. 1009;

Paris v. United States (4th Cir.), 137 F. (2d) 300;

Clemons v. United States (4th Cir.), 137 F. (2d) 302.

Judicial discretion is not completely unfettered, but must be exercised within such boundaries as will observe the spirit of the law and do justice. As was said in *Camarota v. United States,* 2 F. (2d) 650, at page 651:

> "In imposing sentences much latitude is accorded trial courts, and with sentences imposed within the terms of the statutes, appellate courts have little or nothing to do. Therefore, we are not concerned with the sentence which the court imposed upon Camarota in this case. We are concerned with its refusal, in the circumstances, to allow him to withdraw his plea of guilty to the third count, enter a plea of not guilty and go to trial.
>
> "Concededly, an application of this kind is addressed to the discretion of the trial court. Here again the law allows much latitude. But such discretion, as was early said by Lord Mansfield in the Case of John Wilkes, 4 Burr. pt. IV, 2539, 'means sound discretion guided by law. It must be governed by

rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular.' Adhering to the same concept, later courts have held that judicial discretion must 'be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice.' *Moody v. Riechow,* 38 Wash. 303, 80 P. 461, 462. 'It is of the essence of justice not to decide against anyone on grounds which are not charged against him, and as to which he has not had an opportunity of offering explanations or calling evidence.' *O'Rorke v. Bolingbroke,* L. R. 2 App. Cas. 834."

In the case at bar, the trial court should have taken into consideration the fact that defendants' pleas of guilty were entered as the result of the understanding and agreement between respective counsel and the Probation Officer of the District Court that only small fines and no imprisonment whatever would be recommended to the Court.

B.

Counsel for the Government and the Probation Officer of the District Court did not observe and keep their understanding and agreement with defendants. This is clearly apparent from the record.

The understanding and agreement mentioned was in substance that appellants withdraw their pleas of not guilty to all six counts of the Information, enter pleas of guilty to Counts I and III thereof, and that each defendant be fined $125.00 on each of Counts I and III—a total for both defendants of $500.00—and that Counts II, IV, V and VI of the Information be dismissed.

Facts Shown by the Record.

In the Affidavit of John W. Preston filed in support of the Motion to Vacate Judgments and Sentences, etc., the following statements appear concerning said understanding and agreement:

> "After talking with Mr. Johnson, your affiant then recontacted Mr. Kinnison and informed him of the statements made by Mr. Johnson. Affiant then asked Mr. Kinnison what he thought of a fine of $125.00 on each count, making a total of $500.00, with no imprisonment, if the defendants should enter pleas of guilty to the two counts. Mr. Kinnison responded that he thought that was just about the correct judgment that should be entered.
>
> "Affiant then asked Mr. Kinnison if he would recommend in open court such a disposition of the case. He responded that he did not feel free to mention figures to the Court and would not do so unless the Court requested a recommendation from him, but he volunteered then and there to say that he could talk about the disposition of the cause and the amount of the fines to the probation officer and that the probation officer, in turn, was privileged to make, and would make, recommendations, including the amount of the fines, to the Court. He likewise promised to talk to the probation officer and ascertain from him if he would make a recommendation in the manner and amounts above set forth.
>
> "Affiant waited a day or two and again asked Mr. Kinnison if he had talked to the probation officer about this recommendation. Mr. Kinnison replied that he had and that the probation officer said that he would make such recommendations to the Court with the sole proviso that the records of the defendants should be free from prior convictions.

"Affiant, knowing that no prior convictions had been had, related these facts substantially as stated to defendants and upon this assurance they consented, upon affiant's recommendation, to withdraw their pleas of not guilty and to enter pleas of guilty to counts one and three of the information." [R. 67-68.]

The statements in said Affidavit just quoted are in all essential respects confirmed by the Affidavit of Ray H. Kinnison, Assistant United States Attorney, as follows:

"Thereafter, on the same day, your affiant talked to Mr. Meader, of the probation department, giving him the facts of the case and stating that Mr. Preston had suggested the amount of Five Hundred ($500.00) Dollars as being a reasonable amount to fine the defendants. Mr. Meader stated that upon the facts stated, if the defendants had no prior record, 'and all other things being equal,' the probation office would undoubtedly recommend a 'moderate fine.' Thereafter, on the same day, your affiant called Mr. Preston on the telephone and repeated to him the statements made by Mr. Meader. Arrangements were then made to advance the case upon the calendar for defendants to change their plea." [R. 78.]

In this connection John W. Preston testified at the hearing of the Motion to Vacate Judgments and Sentences as follows:

"Q. I mean, what was your understanding, if I may interrupt, with Mr. Kinnison? A. That is what I am leading to. After talking the matter over and investigating it, I called on Mr. Kinnison, over the telephone, I think, first, and I don't remember the date—probably about the 5th or 6th of August—and he told me that he had made a proposition to Mr. Mirman, my associate here, whereby a plea of guilty

to two counts might be entered, and the remaining counts dismissed, but on thinking it over he thought that would be satisfactory to him, but he didn't want to take that stand without the consent of the legal staff of the OPA, and anything they agreed to would be all right. And I asked him what sentences had been meted out in similar cases, and he said the highest one he knew of was a fine levied by Judge Beaumont of $250.00. I then, acting on his offer, went to see Mr. Johnson, of the OPA staff, and talked at length with him about it, and he told me that a plea on two counts would be satisfactory to him. And I told him I was going to report that to Mr. Kinnison. And I asked him which counts, and he said No. 1 and I asked him which after that, and he said any other one, that it didn't make any difference to them. I then relayed this information to Mr. Kinniston, and asked him what he thought of $125.00 as the maximum fine on each count, and he said, 'That is, in my opinion, just right.'

Q. He did state to you that it was his opinion? A. He did, yes, in his judgment, it was just right. And I then asked him if he would make such a recommendation to the Court, and he said, 'You know Judge Harrison. You can't make recommendations in his Court, and I can't do it unless he asks me.' I said to him, 'It is sometimes done, even in Judge Harrison's Court,' and he said, 'I can do this,' he says, 'I can talk to the Probation Officer, and,' he says, 'he can talk to the Judge and make recommendations.' I said, 'Well, you can talk with the Probation Officer and see if he will make this recommendation,' and he said he would. And he either called me or I called him, and I asked him what the Probation Officer said, and he said the Probation Officer was agreeable to it, and he would do it unless, on investi-

gation, he found that there was a previous conviction against the defendants. And I told him I didn't fear that at all. And that was the understanding." [R. 83-84.]

"Q. Now, Judge, with those facts in mind, you advised your clients, did you not, to plead guilty in this case? A. I did. I consulted with them, and I said, 'You have got a 50-50 chance to beat this case, but,' I said, 'the OPA has put the law under attack, but I think they will straighten this out, and I don't believe we will make a fight on the law or regulations.' And I said, 'I have talked it over with the United States Attorney's office and the Probation Officer has agreed to recommend a fine of not to exceed $125.00 on each count, and I recommend that you change your plea on that ground.'

Q. Didn't you just say that Mr. Kinnison said he could not recommend the fine? A. He said just what I said, exactly.

The Court: You also advised your clients that sentence would be imposed, and that that was a matter that was up to the Court? A. I told them that the Court would not have to live up to it, but I knew then, as I know now, that the defendants would have the right to change their pleas, if this was not lived up to. I had been through that, and I knew that." [R. 86.]

In view of the foregoing statements from the Affidavits and testimony in this case there can be no question as to the existence of an understanding and agreement between appellants' counsel on the one hand and Government counsel and the Probation Officer of the trial court on the other, or that said understanding and agreement was other than as above stated. It was upon this understand-

ing and agreement that appellants agreed to withdraw their pleas of not guilty and enter pleas of guilty.

Instead of respecting the agreement, however, the Probation Officer reported and recommended to the trial court as follows:

"SUMMARY:

"Investigation has shown that Aaron Rosensweig and Abe Rosensweig were violating price ceiling according to a well-planned scheme. Their invoices of maximum prices and checks received from buyers show similar amounts. However, they accepted further cash payment on the side. OPA investigation indicates that thousands of dollars overcharge was probably made by this method.

"RECOMMENDATION:

"Because of the clear past record of these defendants, penitentiary sentence is not recommended. It is recommended that they be given a heavy fine and placed on probation." [R. 79.]

C.

(1) In view of the facts disclosed by the record, *supra*, there can be no doubt that the agreement that induced withdrawal of pleas of not guilty and entry of pleas of guilty was not respected by the Probation Officer or Counsel for the Government. In such circumstances the trial court should, in a spirit of fairness and justice, have vacated the judgments and sentences and granted a new trial. To refuse to do so was an abuse of discretion. Appellants' motion was broad enough to justify the granting of that relief without regard to the withdrawal of pleas of guilty and re-entry of pleas of not guilty, and it is beside the point for the Government to argue that Rule II(4) of Rules of Practice and Procedure in Criminal

Cases precludes such relief. Appellants' motion, treated solely as a motion to vacate judgments and sentences and for a new trial, cannot be thus summarily denied because of said Rule II(4). The motion was addressed to the sound discretion of the Court, and the Court was not precluded from vacating judgments and sentences and from granting a new trial because of Rule II(4). Moreover, appellants insist the Court could and should have permitted withdrawal of pleas of guilty and re-entry of pleas of not guilty under the authority of *Robinson v. Johnston* (9th Cir.), 118 F. (2d) 998, 1000, and other cases cited in Appellants' Reply Brief, pages 32-38. In any event, however, the motion, in so far as it sought to vacate judgments and sentences and grant a new trial, should have been sustained.

(2) The Probation Officer and United States Attorney insisted upon and the Court rendered judgment against defendants for crimes not embraced in their pleas of guilty.

The report of the Probation Officer says:

> "OPA investigation *indicates* that thousands of dollars overcharge was *probably* made by this method." (Italics ours.)

Assuming, *arguendo,* that the statement is true, the overcharge alleged in Count I of the Information was the only one before the Court and that amounted to $20.73. The OPA investigation must, therefore, have referred to other supposed violations by defendants. Moreover, the alleged investigation by OPA only "indicates" that de-

fendants "probably" made other overcharges. In this connection, the Assistant United States Attorney, prior to judgment, made the following statements to the Court:

> "The Court: What is the position of the Government?
>
> Mr. Kinnison: The position of the Government is, I believe, more or less like in the report of the Probation Officer. The only matter is, I might somewhat question the size of the defendants' business, for the reason that the information on our file indicates a business greatly in excess of that mentioned by Judge Preston.
>
> Mr. Preston: That is what I am told. Am I correct?
>
> The Defendant: Yes.
>
> Mr. Kinnison: There is evidence in the file of payments made by one of the defendants of $7,060.00 bank deposit in one day. That would lead me to believe their business is somewhat larger than represented. I have no definite information.
>
> Mr. Preston: What I referred to was beef, Your Honor. There may be some other livestock which would make it greater.
>
> Mr. Kinnison: I think we should have a true picture before the Court." [R. 59-60.]

The judgment of the trial court obviously rested in large part upon statements by the Probation Officer and Assistant United States Attorney concerning matters irrelevant to the offense charged in the Information, and these statements were in violation of the agreement. In other words, defendants were convicted and given sentences for offenses for which they were not on trial and which were not proven by any competent evidence.

Before rendering judgment the trial court made the following statement:

> "The Court: The offense to which they have pleaded is a deliberate, planned offense. It may be true that the regulations of the OPA made it difficult for them to operate, but take the situation of the father; he came to this country, was naturalized, raised his family here, and prospered here. Those opportunities were furnished to him by our form of Government, and are the opportunities which are accorded to everyone. When it came down to the test, when this country is fighting for its life, not only on the battle front, but on the home front, these people who owe so much to this country, have violated our laws.
>
> "I have heretofore described this class of offense as secondary sabotage, and that is the way I feel about it now. I haven't any sympathy for these defendants, as I stated before, because their offense was deliberate, and it was motivated by the profit they desired to make at a time when our Government is striving to maintain price levels. I realize these price levels at times work a definite hardship on people, but this Court is not inclined to take these offenses lightly, and unfortunately, people who violate these price ceilings are not deterred by fines." [R. 60.]

The statements of respective Counsel and of the Court show that the Court's judgment and the severity of the sentences imposed were due to the failure of Government Counsel and the Probation Officer to live up to the understanding and agreement. Appellants were, in fact, given sentences which were based upon the report and recommendation of the Probation Officer, acquiesced in by the Assistant United States Attorney in open court, which

appellants had no opportunity to rebut or explain. In short, if the judgment is not reversed, appellants will be punished for offenses not charged against them and to which they did not plead guilty.

Under such circumstances, the cases cited in Appellants' Opening Brief, pages 19-23, and in their Reply Brief, pages 32-38, are directly in point, and, we respectfully submit, should be followed. See:

United States v. Fox, 130 F. (2d) 56, 59;

Kercheval v. United States, 274 U. S. 220, 71 L. Ed. 1009;

United States v. Woody, 2 F. (2d) 262;

Deutsch v. Aderhold, 80 F. (2d) 677, 678;

Paris v. United States, 137 F. (2d) 300;

Clemons v. United States, 137 F. (2d) 302;

People v. Schwarz, 201 Cal. 309.

Conclusion.

Wherefore, appellants respectfully submit that the judgment of the trial court should be reversed and a new trial be granted.

Respectfully submitted,

JOHN W. PRESTON and
SAMUEL MIRMAN,

By JOHN W. PRESTON,

Attorneys for Appellants.

APPENDIX.

Emergency Price Control Act of 1942.

Three printed copies of the Act have been furnished appellants by the District Enforcement Attorney of Price Administration and the same are permanently attached hereto for use by the Court. In addition thereto Sections 1, 2(a) (c) (d) (g) (h), 4(a), 201(d), 203(a) (b) (c), 204(a) (b) (c) (d), 205(b), (c), 301, 302(a) (b) (c) (i) and 305 appear at pages 1 to 13 of the Appendix to Appellee's Brief.

For the convenience of the Court, Section 3 of the Act is set out in full as follows:

> "Sec. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.
>
> (b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops

corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section."

Inflation Control Act of 1942.

Sections 961 to 971, both inclusive, of Title 50, U. S. C. A. Appendix, constituting the Inflation Control Act of 1942, appear in full at pages 14-22 of the Appendix to Appellee's Brief.

Revised Maximum Price Regulation No. 169.

The District Attorney for the Office of Price Administration has furnished appellants with three printed copies of Revised Maximum Price Regulation No. 169 issued by Chester Bowles, Administrator, on January 28, 1944, and the same are separately submitted to the Court and are not attached hereto because of the size and bulk thereof. As stated by the District Enforcement Attorney for OPA in his accompanying letter "it should be noted however that RMPR 169 includes amendments up to January 28, 1944 and RMPR 148 includes amendments to February 18, 1944."

Section 1364.455(a) (8) and (9) has been compared and found to be identical with said section as effective at the time of the date of the alleged violation thereof set forth in the Information. Section 1364.477 (3) has been compared but differs somewhat from said section as effective at the date of the alleged violations thereof.

For the convenience of the Court, Sec. 1364.455(a) (8) and (9) and Sec. 1364.477 (3) as effective at the dates of the alleged violations thereof are herewith submitted *in haec verba* as follows:

> "Sec. 1364.455. *Definitions applicable to beef.* (a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to beef, the term: (Subsections (1) to (7) omitted.)

"(8) 'Beef carcass' means and is limited to the dressed carcass, side, or sides of beef, which shall be dressed with the 1st and 2nd tail (caudal) vertebrae, kidney knob or knobs and hanging tender left on. The beef carcass shall not be broken in any other manner than provided in paragraph (a) (9) of this Sec. 1364.455.

"(9) 'Beef wholesale cut' means and is limited to any of the following cuts meeting the following minimum specifications, derived from the beef carcass, but excluding the offal and any item not included herein. (All measurements prescribed herein shall be made with a rigid straight ruler. All cuts shall be made according to the definite guides and measurements specified. Ribs are designated as 1st to 13th, inclusive, counting as the 1st rib that one which is nearest the neck end of the side.)

"Sec. 1364.477. *Definitions applicable to processed products.* (a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to processed products the term: (Subsections (1) and (2) omitted.)

"(3) 'Processed products' means ground, cured, pickled, spiced, smoked, dried or otherwise processed beef and/or veal, including ground hamburger and sausage containing any proportion of beef or veal: *Provided,* That any beef carcass, or cut thereof, including any beef wholesale cut which has been boned as permitted in subpart B of this Revised Regulation or otherwise, or any veal carcass, or cut thereof, including any veal wholesale cut which has been boned as permitted in subpart C of this Revised Regulation or otherwise shall not be deemed a processed product. Products of each grade and brand, and in each stage of processing, shall be considered separate processed

products. Each type of canned and packaged meat, made entirely from beef and/or veal shall be considered a separate processed product. Kosher processed products shall for the purposes of Sec. 1364.476 be regarded as separate processed products."

NOTE: It has been impossible to obtain and furnish copies of Revised Maximum Price Regulation No. 169 *in haec verba* effective as of the date of the offenses charged in the Information.

Revised Maximum Price Regulation No. 148.

Three printed copies of Revised Maximum Price Regulation No. 148 issued by Chester Bowles, Administrator, on February 18, 1944, are submitted to the Court separately because the size and bulk thereof preclude attaching the same hereto.

"It should be noted, however, that * * * RMPR 148 includes amendments to February 18, 1944." (Accompanying letter, H. Eugene Breitenbach, District Enforcement Attorney for OPA.)

NOTE: It has been impossible to obtain and furnish copies of Revised Maximum Price Regulation No. 148 *in haec verba* effective as of the date of the offenses charged in the Information.

EMERGENCY PRICE CONTROL ACT OF 1942

[PUBLIC LAW 421—77TH CONGRESS]

[CHAPTER 26—2D SESSION]

[H. R. 5990]

AN ACT

To further the national defense and security by checking speculative and excessive price rises, price dislocations, and inflationary tendencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GENERAL PROVISIONS AND AUTHORITY

PURPOSES; TIME LIMIT; APPLICABILITY

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1943, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations,

orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

(c) The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia.

PRICES, RENTS, AND MARKET AND RENTING PRACTICES

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to

the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d; except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. In any case in which a commodity is domestically produced, the powers granted to the Administrator by this subsection shall be exercised with respect to importations of such commodity only to the extent that, in the judgment of the Administrator, the domestic production of the commodity is not sufficient to satisfy the demand therefor. Nothing in this section shall be construed to modify, suspend, amend, or supersede any provision of the Tariff Act of 1930, as amended, and nothing in this section, or in any existing law, shall be construed to authorize any sale or other disposition of any agricultural commodity contrary to the provisions of the Agricultural Adjustment Act of 1938, as amended, or to authorize the Administrator to prohibit trading in any agricultural commodity for future delivery if such trading is subject to the provisions of the Commodity Exchange Act, as amended.

(f) No power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of section 3, and no agricultural commodity shall be sold within the United States pursuant to the provisions of this section by any governmental agency at a price below the price limitations imposed by section 3 (a) of this Act with respect to such commodity.

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

(i) No maximum price shall be established for any fishery commodity below the average price of such commodity in the year 1941.

AGRICULTURAL COMMODITIES

Sec. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section.

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or occupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder.

(c) It shall be unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, to disclose, otherwise than in the course of official duty, any information obtained under this Act, or to use any such information, for personal benefit.

(d) Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.

VOLUNTARY AGREEMENTS

SEC. 5. In carrying out the provisions of this Act, the Administrator is authorized to confer with producers, processors, manufacturers, retailers, wholesalers, and other groups having to do with commodities, and with representatives and associations thereof, to cooperate with any agency or person, and to enter into voluntary arrangements or agreements with any such persons, groups, or associations relating to the fixing of maximum prices, the issuance of other regulations or orders, or the other purposes of this Act, but no such arrangement or agreement shall modify any regulation, order, or price schedule previously issued which is effective in accordance with the provisions of section 2 or section 206. The Attorney General shall be promptly furnished with a copy of each such arrangement or agreement.

TITLE II—ADMINISTRATION AND ENFORCEMENT

ADMINISTRATION

SEC. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

(c) The Administrator shall have authority to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere; for lawbooks and books of reference; and for paper, printing, and binding) as he may deem necessary for the administration and enforcement of this Act. The provisions of section 3709 of the Revised Statutes shall not apply to the purchase of supplies and services by the Administrator where the aggregate amount involved does not exceed $250.

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

INVESTIGATIONS; RECORDS; REPORTS

SEC. 202. (a) The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confi-

dential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

PROCEDURE

Sec. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

REVIEW

Sec. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have

exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and

fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with

State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

(f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with

the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202: *Provided*, That no such license may be required as a condition of selling or distributing (except as waste or scrap) newspapers, periodicals, books, or other printed or written material, or motion pictures, or as a condition of selling radio time: *Provided further*, That no license may be required of any farmer as a condition of selling any agricultural commodity produced by him, and no license may be required of any fisherman as a condition of selling any fishery commodity caught or taken by him: *Provided further*, That in any case in which such a license is required of any person, the Administrator shall not have power to deny to such person a license to sell any commodity or commodities, unless such person already has such a license to sell such commodity or commodities, or unless there is in effect under paragraph (2) of this subsection with respect to such person an order of suspension of a previous license to the extent that such previous license authorized such person to sell such commodity or commodities.

(2) Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations hereinafter provided, for an order suspending the license of such person for any period of not more than twelve months. If any such court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months. For the purposes of this subsection, any such proceedings for the suspension of a license may be brought in a district court if the licensee is doing business in more than one State, or if his gross sales exceed $100,000 per annum. Within thirty days after the entry of the judgment or order of any

court either suspending a license, or dismissing or denying in whole or in part the Administrator's petition for suspension, an appeal may be taken from such judgment or order in like manner as an appeal may be taken in other cases from a judgment or order of a State, Territorial, or district court, as the case may be. Upon good cause shown, any such order of suspension may be stayed by the appropriate court or any judge thereof in accordance with the applicable practice; and upon written stipulation of the parties to the proceeding for suspension, approved by the trial court, any such order of suspension may be modified, and the license which has been suspended may be restored, upon such terms and conditions as such court shall find reasonable. Any such order of suspension shall be affirmed by the appropriate appellate court if, under the applicable rules of law, the evidence in the record supports a finding that there has been a violation of any provision of such license, regulation, order, price schedule, or requirement after receipt of such warning notice. No proceedings for suspension of a license, and no such suspension, shall confer any immunity from any other provision of this Act.

SAVING PROVISIONS

SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. Such price schedules shall be consistent with the standards contained in section 2 and the limitations contained in section 3 of this Act, and shall be subject to protest and review as provided in section 203 and section 204 of this Act. All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

TITLE III—MISCELLANEOUS

QUARTERLY REPORT

SEC. 301. The Administrator from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act. If the Senate or the House of Representatives is not in session, such reports shall be transmitted to the Secretary of the Senate, or the Clerk of the House of Representatives, as the case may be.

DEFINITIONS

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

(d) The term "defense-rental area" means the District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act.

(e) The term "defense-area housing accommodations" means housing accommodations within any defense-rental area.

(f) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, hotels, rooming or boarding house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(g) The term "rent" means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations.

(h) The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency.

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations. Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

(j) The term "documents" includes records, books, accounts, correspondence, memoranda, and other documents, and drafts and copies of any of the foregoing.

(k) The term "district court" means any district court of the United States, and the United States Court for any Territory or other place subject to the jurisdiction of the United States; and the term "circuit courts of appeals" includes the United States Court of Appeals for the District of Columbia.

SEPARABILITY

SEC. 303. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

APPROPRIATIONS AUTHORIZED

SEC. 304. There are authorized to be appropriated such sums as may be necessary or proper to carry out the provisions and purposes of this Act.

APPLICATION OF EXISTING LAW

SEC. 305. No provision of law in force on the date of enactment of this Act shall be construed to authorize any action inconsistent with the provisions and purposes of this Act.

SHORT TITLE

SEC. 306. This Act may be cited as the "Emergency Price Control Act of 1942".

Approved, January 30, 1942.